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IN THE SUPREME COURT OF THE UNITED STATES

MARCH 1983 TERM

NO. A-594

82-6106

MARK ARTHUR KING,

PETITIONER

VERSUS

STATE OF MISSISSIPPI,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

WHETHER THE COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE IN THIS CASE VIOLATED PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS?

II.

WHETHER INSTRUCTION D-7 CLEARLY STATES THE RELATIVE WEIGHT TO BE GIVEN MITIGATING AND AGGRAVATING CIRCUMSTANCES?

III.

WHETHER A SENTENCING JURY MUST BE INSTRUCTED THAT IF IT CANNOT UNANIMOUSLY AGREE ON WHICH CIRCUMSTANCE OUTWEIGHS THE OTHER, THAT ITS VERDICT SHOULD BE THAT IT CANNOT AGREE ON THE PUNISHMENT TO BE INFLICTED?

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Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as Mack Arthur King v. State of Mississippi, 423 So.2d 121 (Miss. 1982). A copy of the opinion is before the Court as an Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. 1257(3). He has failed to do so.

CONSTITUTIONAL PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendments VIII and XIV. This case also involves Sections 99-19-101 and 99-19-105, Miss. Code of 1972 Annotated.

STATEMENT OF THE CASE

Petitioner, Mack Arthur King, was indicted for the crime of Capital Murder by the grand jury of the Circuit Court of Lowndes County, Mississippi, during the August, 1980 Term. The indictment grew out of the August 3, 1980 slaying of eighty-one year old Mrs. Lelia Patterson.

Petitioner was tried during the August 1980 Term of the Lowndes County Circuit Court. His bifurcated trial was conducted under the procedures set forth in Sections 99-19-101 to 107, Miss. Code Ann. (Supp. 1977), and Jackson v. State, 337 So.2d 1242 (Miss. 1976). At the conclusion of the first stage of the bifurcated trial the jury retired to consider the issue of guilt. After deliberation the jury returned a verdict of capital murder. The trial then continued into the second or sentencing stage. After hearing additional testimony and hearing arguments of counsel the jury retired to consider sentence. After deliberation the jury returned a sentence of death in the proper form.

On automatic review to the Mississippi Supreme Court the conviction and sentence of death was affirmed by the court on December 7, 1982. King v. State, 423 So.2d 121 (Miss. 1982). A petition for rehearing was filed on November 10, 1982 without written opinion.

On January 6, 1983, this Court stayed petitioner's execution date pending filing, consideration and disposition of this petition.

The facts as reflected by the record show that about 10:30 a.m. on August 3, 1980, Mrs. Lelia Patterson was found dead in a bathtub in her home. An investigation revealed that the screen on a door had been cut, the telephone wires outside the house had been severed, articles were scattered throughout the house, and dresser drawers had been emptied on the floor. A fingerprint and palmprint were found on two file folders in a box located in the house. The prints matched known fingerprints and palmprints of Petitioner. Petitioner's residence was searched two days later and several items which belonged to Mrs. Patterson were found. Petitioner was arrested on August 6th and denied that he had been at Mrs. Patterson's house on August 3rd. The officers interviewed appellant's girlfriend, Barbara Jordan and on the basis of information received from her, petitioner's residence was searched a second time and additional items from Mrs. Patterson's home were found.

Petitioner was questioned after the second search and admitted that he entered the house of Mrs. Patterson on Saturday night, August 2nd, burglarized the house, saw Mrs. Patterson, but did not kill her. In his second statement he said he was accompanied by Willie Porter who remained outside while petitioner burglarized the house, that Mrs. Patterson was alive when he left the house, and that Willie Porter

entered the house as he was leaving. Petitioner also said he saw Willie later in the morning of August 3rd and Willie told him that he, Willie, had taken some articles from Mrs. Patterson's house.

After signing the second statement, Petitioner agreed to another search of his premises and told the officers where to find additional items stolen from Mrs. Patterson which were hidden near his house.

According to Barbara Jordan, petitioner showed her some of the articles he had stolen but did not tell her where they came from. She testified that petitioner was wearing green pants on Saturday, August 2nd and Sunday, August 3rd which were confiscated by the police. On Tuesday petitioner washed the pants after refusing to let the witness wash them as was customary. Human blood was found on the pants but not in a sufficient amount to ascertain the blood type.

The pathologist who performed the autopsy on Mrs. Patterson's body testified that she had multiple bruises about her neck, face, and arms, a laceration on the back of her head, and water in her lungs. In the opinion of the pathologist Mrs. Patterson had been manually strangled, struck on the back of the head with such force that it caused edema of the brain, and had been under water while she was either conscious or unconscious. He was unable to ascertain the order in which the events occurred, but stated if the manual strangulation took place first, then the victim could have regained consciousness, but if the trauma to the skull occurred first, she possibly never regained consciousness. Mrs. Patterson's death could be attributed to either strangulation, a blow

to the head, or drowning. The findings of the pathologist show conclusively that Mrs. Patterson was brutally murdered.

ARGUMENT

PROPOSITION I.

THE COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE IN THIS CASE VIOLATED PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Petitioner attacks the eighth statutory aggravating circumstance of §99-19-101(5)(h) Miss. Code Ann. (Supp. 1978), which authorized the imposition of the death penalty if the "capital offense was especially heinous, atrocious or cruel." Petitioner contends the Mississippi Supreme Court "has never undertaken to provide any standards that might limit the application of the 'especially heinous, atrocious or cruel' aggravating circumstance." (Petitioner's Brief, p. 12)

Petitioner's argument was not raised at trial or on appeal to the Mississippi Supreme Court and therefore under the rationale of Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981) and Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969) this Court lacks jurisdiction to decide an issue that has never been presented to the state Courts or was not presented in a federal constitutional context to the state courts.

As held in Webb, supra:

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. New York ex rel. Bryan v. Zimmerman, 278 U.S. 63, 67, 73 L.Ed. 184, 49 S.Ct. 61, 62 ALR 785 (1928); Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, 41 L.Ed. 1149, 17 S.Ct. 709 (1897).
>
> It is appropriate to emphasize again, see Cardinale v. Louisiana, supra, at 439, 22 L.Ed.2d 398, 89 S.Ct. 1161, that there are powerful policy consideratins underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.
>
> (68 L.Ed.2d at 398)

If petitioner had succeeded in invoking the jurisdiction of this Court, which he has not, his argument would have been without merit.

It must also be noted that the jury found that a second aggravating circumstance existed, i.e., the capital murder was committed while the defendant was engaged in the commission of the crime of burglary or in an attempt to commit a burglary.

In response to petitioner's argument regarding §99-19-101(5)(h) respondent would show that the identical question was raised in Washington v. State, 361 So.2d 61 (Miss. 1978). Responding thereto, the Court held:

> Mississippi Code Annotated section 99-19-101(5) (Supp. 1977) lists eight aggravating circumstances which may be considered by the jury. (5)(h) provides:
>
> > The capital offense was especially heinous, atrocious or cruel."
>
> The appellant contends that the language of (5)(h) is unconstitutionally vague. We do not agree.
>
> We must remember that the twelve members of the trial jury were a jury of the defendant's peers, and came from the county of the defendant's residence. The jury was composed of average citizens possessing average intelligence, a cross-section, if you please, of the citizenry of the community. In our opinion the words "espcially heinous, atrocious or cruel" are not confusing nor likely to be misunderstood by the average knowledge of the generally accepted meaning of these words. He comes in contact with these words frequently, if not in personal conversation at least through the news media of television, radio or the press.
>
> We think this language from Gregg v. Georgia, supra, sheds light on the confidence we must place in the average contemporary jury to correctly interpret words which of necessity must be general when placed in statutes:
>
> "Jury sentencing has been considered desirable in capital cases in order 'to maintain a link between contemporary community value and the penal system— a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."' Witherspoon v. Illinois, 391 U.S. [510], at 519 n. 15, 88 S.Ct. [1170], at 1175

n. 15 [20 L.Ed.2d 776 (1968)], quoting Trop v. Dulles, 356 U.S. [86], at 101, 78 S.Ct. [590], at 598 [2 L.Ed.2d 630 (1958)] (plurality opinion)." 428 U.S. at 190, 96 S.Ct. at 2933, 49 L.Ed.2d at 884.

> The facts in no two cases are exactly identical and no precise definition or formula can be made to cover every possible factual situation.
>
> It is our considered opinion that the average jury in its sound discretion and judgment understands the generally accepted meaning of the words "especially heinous, atrocious or cruel" and is able to apply these words to different factual situations without further definition of these words.
>
> It is our opinion that these words are not unconstitutionally vague.
>
> (361 So.2d at pp. 65-66)
> (emphasis supplied)

While the Court declined to further directly define by judicial construction the words "heinous, atrocious or cruel", it gave to them their "generally accepted meaning" and left to the jury the task of applying these words to the various factual situations involved in death penalty cases.

The Court fully concurred with Washington's sentencing jury which found that his offense was "especially heinous, atrocious, and cruel." It observed that:

> The jury had before it this evidence: The killing was committed during the commission of an armed robbery. Prior to killing Woods, the defendant struck the victim over the head with a long barrel shotgun with much force. The defendant, with a bag full of money, had reached the door and could have easily left without any danger to himself, yet he fired a load of buckshots at close range into the stomach of Woods, causing a massive wound from which there was no chance of recovery. It was an especially wanton, willful, useless and cruel killing.
>
> (361 So.2d at p. 67)
> (emphasis supplied)

In rejecting an identical argument in Spinkellink, the Fifth Circuit said:

> "Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. . . .What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim." 578 F.2d at 611 (Emphasis added).

(378 So.2d at p. 648)

We are not, therefore, in accord with petitioner's assertion that the Supreme Court of Mississippi has never defined the statutory language "especially heinous, atrocious, and cruel." It has on several occasions done so, albeit indirectly. The Court has characterized such killings as "wanton, willful, useless and cruel", [1] "brutish" and brutal", [2] "senseless", [3] and "unprovoked." [4] Moreover, the Court has looked to the posture of the victim and the motive or purpose of the defendant in perpetrating his crime. [5] Such is not constitutionally impermissible but is a product of common sense.

Summarizing our response to this particular contention, we respectfully submit that §99-19-101(5)(h) has not been applied so broadly as to create a "standardless and unchanneled imposition of death sentences." Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980). Nor is there any compelling reason to think that such a result will occur in the future.

1/ SEE: Washington v. State, 361 So.2d at p. 67.

2/ SEE: Gray v. State, 375 So.2d at p. 1004.

3/ SEE: Culberson v. State, 379 So.2d at p. 510; Coleman v. State, 378 So.2d at p. 650.

4/ SEE: Culberson v. State, 379 So.2d at p. 510.

5/ SEE: Reddix v. State,

PROPOSITION II.

WHERE THE INSTRUCTION CLEARLY STATES THE RELATIVE WEIGHT TO BE GIVEN MITIGATING AND AGGRAVATING CIRCUMSTANCES CERTIORARI SHOULD NOT BE GRANTED.

Petitioner contends the trial court did not properly instruct the sentencing jury that they might recommend mercy and sentence the defendant to life even if aggravating circumstances were found and such aggravating circumstances were outweighed by mitigating circumstances. Such issue clearly was not raised below nor set out in the constitutional context as is herein presented for the first time.

Again under the rationale of Webb v. Webb, supra, and Cardinale v. Louisiana, supra, this Court lacks jurisdiction to decide an issue that has not been presented to the state Court or was not presented in a federal constitutional context to the state courts.

Petitioner has not presented any issue to this Court of which it has jurisdiction.

PROPOSITION III.

CERTIORARI SHOULD NOT BE GRANTED TO DETERMINE WHETHER A SENTENCING JURY MUST BE INSTRUCTED THAT IF IT CANNOT UNANIMOUSLY AGREE ON WHICH CIRCUMSTANCE OUTWEIGHS THE OTHER, THEN ITS VERDICT SHOULD BE THAT IT CANNOT AGREE ON THE PUNISHMENT TO BE INFLICTED.

Petitioner argues the instruction as granted gave the jury no guidance as to a fourth possible finding, i.e., that they could not agree as to whether the mitigating circumstances outweighed the aggravating circumstances or vice versa.

Respondent would show that Instruction D-7 as offered at trial by the defense provided:

INSTRUCTION D-7

You have found the Defendant guilty of the crime of Capital Murder. You must now decide whether the Defendant will be sentenced to death or to life imprisonment. In reaching your decision, you must objectively consider the detailed circumstances of the offense for which the Defendant was convicted, and the character and record of the Defendant himself.

To return the death penalty you must find that any aggravating circumstances--those which tend to warrant the death penalty--out weigh the mitigating circumstances--those which tend to warrant the less severe penalty.

Consider only the following elements of aggravation in determining whether the death penalty should be imposed:

1) The Capital Murder was committed while the Defendant was engaged in the commission of the crime of burglary or in an attempt to commit a burglary.

2) The Defendant committed the Capital Murder in an especially heinous, atrocious, and cruel manner.

You must unanimously find, beyond a reasonable doubt, that one or more of the above aggravating circumstance(s) exist in this case to return the death penalty. If none of the elements are found to exist, the death penalty may not be imposed, and you shall write the following verdict on a sheet of paper:

"We, the jury, find that the Defendant shall be sentenced to life imprisonment."

If one or more of these elements of aggravation listed above is found to exist, then you must consider whether there are mitigating circumstances which out weigh the aggravating circumstance(s). Consider the following elements of mitigating in determining whether the death penalty should not be imposed:

1) All factors and circumstances surrounding the alleged crime,

or

2) The age of the Defendant,

or

3) The background of the Defendant,

or

4) Any other facts or circumstances that you consider relative or probative or act in mitigation.

Any other matter, and any other aspect of the Defendant's character and record, and any other circumstance of the offense brought before you during the trial of this case which you, the jury, determine to be mitigating on the behalf of the Defendant.

If you find from the evidence that one or more of the preceding elements of mitigation exist, then you must consider whether it or they out weighs or overcomes the aggravating circumstance(s) you previously found, and you must return one of the following verdicts:

1) "We, the jury, unanimously find that the aggravating circumstance(s) or: (itemize and write out all of the aggravating circumstance(s) presented in this instruction which you unanimously agree exist in this case beyond a reasonable doubt).

_____

_____

_____

are sufficient to impose the death penalty and there are insufficient mitigating circumstance(s) to outweigh the aggravating circumstance(s).

_____

FOREMAN OF THE JURY"

If you find that mitigating circumstance(s) outweigh the aggravating circumstance(s) and agree to the sentence of life imprisonment, the form of your verdict should be as follows:

2) "We, the jury, find that the Defendant should be sentenced to life imprisonment."

If you find that the mitigating circumstance(s) outweigh the aggravating circumstance(s) and are unable to agree to the sentence of life imprisonment, the form of your verdict should be as follows:

3) "We, the jury, have been unable to unanimously agree on punishment."

The proffered amendment provided:

If you are unable to unanimously agree on which circumstances outweigh the other, and arrive at a verdict fixing punishment, then the form of your verdict should be as follows:

We, the jury, are unable to unanimously agree upon the punishment to be inflicted.

The Court below has consistently held that juries facing capital deliberations must be instructed on mitigating circumstances and their position in the overall sentencing pattern. Accordingly, instructions must "'channel the sentencer's discretion by clear and objective standards'" and "'provide specific and detailed guidance.'" Jordan v. Watkins, 681 F.2d 1083 (5th Cir. 1982), citing Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398, 406 (1980). Intrinsic to this channeling is the inclusion of an instruction on the issue of mitigation. Thus, it has been held reversible error to omit any charge on the worth of mitigating circumstances, Jordan, supra, or to leave out language guiding the jury to know what effect the presence of mitigating

circumstances might have on aggravating circumstances. Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982), Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981). It is noted that in all three of the cases cited above, the defective instruction contained absolutely no charge of any substance as to mitigating circumstances. Such is clearly not the case here.

Instruction D-7, as granted, clearly and adequately charged the jury in a manner whereby their discretion was channeled and guided. The state would suggest that the granting of an amendment like that offered by petitioner would have been in error in that it would have removed any channeling of discretion and authorized return of a verdict totally outside the realm of any of the evidence, in essence, the court would be saying to the jury: "Consider the aggravating circumstances and the mitigating circumstances and then do whatever you want." This result would of course thwart the teachings of the seminal pronouncements of the United States Supreme Court and produce an uneven and prejudicial incidence of capital punishment. This realization was likewise reached in Bullock v. State, 391 So.2d 601, 610 (Miss. 1980), holding that instructions such as the one sought here are in error where they conflict with the court's instructions:

> Instruction D-30 would have told the jury that it need not find any mitigating circumstances in order to return a sentence of life imprisonment; that a life sentence may be returned regardless of the evidence. The instruction was in direct conflict with Instruction D-20 which told the jury to weigh the mitigating circumstances against any aggravating circumstances before returning a verdict and was correctly refused under Jackson v. State, supra.

Instruction D-31 would have told the jury it was instructed there is nothing that would suggest the decision to afford an individual defendant mercy violates the constitution. That statement was taken from language set forth in the opinion of Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 14 L.Ed.2d 859 (1976). It is simply a statement of the opinion, and was not intended as an abstract proposition of law to be given in jury instructions.

In conclusion, if the jurors were not able to unanimously agree that the aggravating circumstances were sufficient to impose the death penalty and that there were insufficient mitigating circumstances to outweigh the aggravating they could not return the death sentence. Further, §99-19-103, Miss. Code Ann. provides in part that, "If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari to the Supreme Court of Mississippi should be dismissed.

Respectfully submitted,

BILL ALLAIN, ATTORNEY GENERAL

Carolyn B. Mills

BY: CAROLYN B. MILLS
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE

I, Carolyn B. Mills, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the above and foregoing BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI to the Honorable James E. Rocap, III, Miller, Cassidy, Larroca & Lewin, 2555 M. Street, N.W., Suite 500, Washington, D. C. 20037.

This, the 30th day of March, A. D., 1983.

Carolyn B. Mills
SPECIAL ASSISTANT ATTORNEY GENERAL